IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 17, 2008 Session

DAN WADE, BUILDING COMMISSIONER FOR HAMILTON COUNTY, TENNESSEE v. WILLIAM J. PATTERSON, JR., ET AL.

Appeal from the Chancery Court for Hamilton County
No. 06-0707 W. Frank Brown, III, Chancellor

No. E2007-02893-COA-R3-CV - FILED JANUARY 29, 2009

William J. Patterson, Jr., and his wife, Alison B. Patterson, own a house in Hamilton County. The house is in an R-1 zone (single-family residential district). After the Pattersons moved from this residence, they began renting it to vacationers on a daily/weekly basis. Dan Wade, the Building Commissioner for Hamilton County ("the Commissioner"), informed the Pattersons that such rentals were an impermissible use under the applicable zoning regulations; he instructed them to cease and desist renting their house for commercial purposes. After the Pattersons refused, this litigation ensued. The trial court eventually granted the Commissioner's motion for summary judgment, finding that the Pattersons' use of their house for commercial purposes violated the applicable zoning regulations. The trial court also rejected the Pattersons' argument that the zoning regulations were unconstitutionally vague as applied to them. After finding that the Pattersons knowingly violated the zoning regulations, the trial court imposed a penalty of $49.99 for each day of a knowing violation, which totaled $22,395.52. The Pattersons appeal. For the reasons discussed at length in this opinion, we find that the zoning regulations are unconstitutionally vague as applied to the Pattersons. The judgment of the trial court is, therefore, reversed and this case is dismissed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, SP. J., joined.

Steven W. Grant and Catherine Giannasi, Chattanooga, Tennessee, for the appellants, William J. Patterson, Jr., and Alison B. Patterson.

David W. Norton, Chattanooga, Tennessee, for the appellee, Dan Wade, Building Commissioner for Hamilton County, Tennessee.

OPINION

I.

This case began when the Commissioner filed a complaint against the Pattersons seeking injunctive relief and monetary damages. According to the complaint:

> Plaintiff alleges that Defendants are the owner[s] of real property located at 1860 Rivergate Terrace, Soddy Daisy, TN 37379, in Hamilton County, Tennessee. . . . Plaintiff avers that Defendants have for some time maintained their house as a tourist court or tourist home in violation of the Zoning Regulations, and continues [sic] to maintain such activity on said real property illegally and unlawfully. (see Exhibit 1).[1]
>
> Hamilton County, Tennessee, pursuant to the Public Acts of the State of Tennessee as codified at T.C.A. § 13-3-101, *et seq*., and § 13-7-101 *et seq*., has duly enacted, adopted, and published the Zoning Regulations setting forth permitted uses of all real property in Hamilton County, Tennessee. Said Zoning Regulations have been in full force and effect during the violations by the Defendants. Said Zoning Regulations are a matter of public record and copies of same are located in the office of Plaintiff at 123 East 7th Street, Chattanooga, Tennessee 37402. The real property as described above has been duly and regularly zoned "R-1," single family residential District with the authorized uses and limitations as set forth in the Zoning Regulations. Defendant's [sic] use of said property as set out above is not allowed in said zone.
>
> Defendants were advised that these activities were in violation of the Zoning Regulations and were given an opportunity to cease the activities maintained in violation of said Zoning Regulations. Defendants have failed to cease such activities and continue same as of the filing of the Complaint.
>
> Pursuant to the statutes of the State of Tennessee, including T.C.A. § 13-7-111, and Article VII, Section 105.3 of the Zoning Regulations, a penalty shall be assessed against any person or persons guilty of violating the Zoning Regulations. The Zoning Regulations further

[1] Exhibit 1 is an internet posting listing the Pattersons' house for rental on a site known as Vacation Rentals By Owners or "vrbo.com". The Pattersons' listing is no longer on this website, presumably because of the injunction issued by the trial court. There are, however, 23 other homes listed in the Chattanooga/Hamilton County area.

> provide that each day an offense is committed shall constitute and be considered a separate offense, and the penalty assessed separately for each such day of violation. . . .
>
> Defendants have used this property for a business, which is not authorized in the R-1 Single Family Residential District. Said use violates Article VII, Section 105.3, and according to said Article, the Building Commissioner may institute an injunction action to enjoin such unlawful use. . . .

(Paragraph numbering in original omitted; footnote added).

The Commissioner requested that the trial court issue an injunction prohibiting the Pattersons from renting their house in a manner contrary to the zoning regulations. The Commissioner also sought an award of damages in an amount not to exceed $49.99 per day for each day the Pattersons knowingly violated the zoning regulations.

The Pattersons responded to the complaint and denied that they were using their house for a use not permitted by the applicable zoning regulations. The Pattersons asserted, among other things, that Article IV, Section 2.1 of the Hamilton County Zoning Regulations specifically permitted or otherwise authorized a number of business activities in a single-family residential district. The Pattersons later amended their answer to allege that the zoning regulations sought to be enforced by the Commissioner were "unconstitutional as applied to the Defendants."

Both sides of this litigation filed a motion for summary judgment, along with a statement of material facts not in dispute. Given the nature of this case, the competing statements of material facts were quite similar and brief. According to the parties, the undisputed facts are: (1) that the Pattersons own the house at issue; (2) that the house is located in Hamilton County, Tennessee; (3) that the house is zoned R-1 (single-family residential use); and (4) that the Pattersons have been offering the house as a vacation rental and have been doing so since 2006.[2]

Following a hearing on the parties' competing motions, the trial court filed a very detailed memorandum opinion. The court noted that the parties were in agreement that the material facts were not in dispute and that, therefore, this case presented a question of law suitable for resolution by way of summary judgment. The trial court also stated that the dispositive issue was whether the

[2] The only "undisputed material facts" contained in the Commissioner's motion that were not also contained in the Pattersons' motion included a claim that the Pattersons "do no background checks on renters, and there are no restrictions on the number of cars." These additional facts alleged by the Commissioner likely played a part in the Pattersons' next door neighbors, the Randalls, filing a motion to intervene in this lawsuit. The Randalls alleged, among other things, that the Pattersons' use of their home as a vacation home interfered with the Randalls' use and enjoyment of their own residence. The Randalls sought monetary damages from the Pattersons. The trial court eventually denied the motion to intervene. The denial of that motion is not at issue on this appeal.

Pattersons' "rental activities" violated the R-1 zoning ordinance of Hamilton County. The memorandum opinion provides, in pertinent part, as follows:

> Hamilton County's R-1 zoning provision is found at Article IV, section 200. This provision states, in relevant part:
>
> **200. R-1 SINGLE-FAMILY RESIDENTIAL DISTRICT REGULATIONS**
>
> **201. Use Regulations**
>
> A. Principal Uses Permitted
>
> (1) Single-Family dwellings
>
> (2) Schools
>
> (3) Parks, playgrounds, and community buildings
>
> (4) Churches
>
> (5) Golf courses, except for driving ranges, miniature courses, and other similar commercial operations
>
> (6) Fire halls and other public buildings
>
> (7) Kindergartens operated by religious or governmental agencies
>
> (8) Day care homes
>
> B. Accessory Uses Permitted
>
> (1) Buildings, structures, and uses customarily incident to any of the above uses, when located on the same lot or tract, and not involving the conduct of a business, subject to the regulations and restrictions of ARTICLES V and VII.
>
> (2) Home occupations, offices, and studios, when situated in the building used by the person engaged in the occupation as his or her private dwelling provided no advertising sign, merchandise, products

> or equipment is displayed for advertising purposes. (See Definition of Home Occupation)

Thereafter, there follows five separate "additional uses" of R-1 zoned property, which are subject to obtaining a permit. These permitted, additional uses are (1) day care centers, (2) kindergartens, (3) single-wide manufactured homes, (4) planned unit developments, and (5) commercial radio, television, telephone and microwave towers. The other portions of the R-1 zoning regulations do not appear applicable to this controversy.

The definition portions of the regulations, found in Article II of the zoning regulations, are helpful in resolving this controversy. . . . [The Commissioner] claims that the Pattersons are using their property as a "Tourist Court" or "Tourist Home". The zoning regulations offer the following definitions of those two terms:

> **TOURIST COURT:** (Motel or Tourist Camp) An area where one-family dwelling units or structures, building or groups of buildings, which may contain more that one unit, may be located and used as temporary living or sleeping quarters.
>
> **TOURIST HOME:** A residential building where lodging is furnished to transients for compensation and containing NOT MORE THAN FIVE sleeping rooms for such transients.

Article IV, Section 1200 of the zoning regulations is entitled C-1 Tourist Court and Motel Commercial District Regulations. . . .

[The Commissioner's] position is fairly simple. The renting out of a residential dwelling on a short-term basis is not a permitted use or an accessory use in an R-1 district. A house is not supposed to be a commercial venture for short-term occupants. Therefore, the Pattersons' use is not authorized, *i.e.*, illegal, and must be enjoined.

Mr. Barry Bennett is the executive director of the Regional Planning Agency. The agency assists in writing and interpreting zoning ordinances. Although the zoning regulations permit the renting of one's dwelling in an R-1 zoning district, Mr. Bennett testified:

If the, if the intent is to lease property or rent property for, you know, more or less permanent residential purposes - in other words, the intent of the . . . R-1 zone, for example, is for more or less permanent establishment of a residence, you know, a domicile, as opposed to the intent to rent to persons on a temporary commercial basis, which would be the type of use that you would find with a motel or a hotel or a travel trailer camp or something of that nature. And uses of that type are specifically regulated and have a very specific zone in which they have to locate and are not permitted in other residential zones.

Q But renting or leasing of property in R-1 is not prohibited?

A No.

Q Can you have a lease of ten years in an R-1 property?

A There's nothing in the regulations that specifies duration. Again, it goes to interpretation of intent and that actual use of the property.

Q You indicated, and I hope have this correct, that intent, of whether leasing is for commercial cases, commercial purposes, would be – would it be fair to say that you indicated that leasing for the intent of commercial purposes, that the shorter the duration the more likely it is commercial?

A I would say so, you know. With the primary consideration being whether or not the, you know, intent of that person is to establish a residence at that location, for however long the duration. And, you know, there are certain indicators as to whether or not that is the intent, you know; such as the establishment of a mailing address or having phones and utilities or other things put, you know, put into one's name.

> If the intent is to lease out, you know, for, again, whatever duration, you know, generally, as you said, if it's, you know, maybe by the day or by the weekend or by the week or whatever, you know, as a vacation type home or something of that nature, someone, you know, is, you know, renting that room or that house or that space and doesn't - you don't consider the structure itself because, you know, we've had many zoning cases where - in commercial or office zones where residential structures have been used for nonresidential purposes.
>
> So it's not the nature of the structure being a house, per se, that determines whether it's in the appropriate zone or not; it's the actual use of the property. And sometimes we have to make a judgment call in lieu of having something that's specifically defined in the zoning regulations as to, you know, what that intent is, what that use is, and what other uses that are specifically defined is it most similar in nature to.
>
> Q All right. Do I understand then or is it fair to say that renting as a vacation home or short-term stay, that you would consider that a commercial use?
>
> A That's - in our discussions, the determination was that would - that use is more similar to a motel type use or a campground type use than a single-family, you know, more or less permanent residential type use, and is more similar to those uses permitted in the tourist court and motel C-1 zone than those uses permitted in the R-1 single-family residential zone.

Deposition of Barry Bennett, pages 41-44.

Mr. Bennett said one issue is whether the person occupying the dwelling is making the dwelling their primary residence. *Id*. at 79. If a person leases a house in an R-1 district for a year, then the lessee is making the dwelling his/her primary residence. A person

renting a home for a period of one-to-seven days does not intend to make the dwelling his/her primary residence. So, in Mr. Bennett's view, one's determining a violation involves far more than "I know it when I see it." *Id*. at 80-81. . . .

The Pattersons have raised several legal issues to counter Hamilton County's position. . . . First, the Pattersons point out, without contradiction, that the term "tourist home" is not found any place in the zoning regulations except in the definition section. Thus, the Pattersons argue that it is permissible for them to rent their house to one family at a time, *i.e.,* such rental is a proper use of a single-family residence because the R-1 zoning ordinance does not specifically exclude the operation of a tourist home in an R-1 district. The Pattersons rely upon the rule of law that says that zoning "[l]aws should be strictly construed in favor of the property owner." *City of Oak Hill v. State ex rel. First Christian Church*, 492 S.W.2d 915, 916 (Tenn. 1973). . . .

Second, the Pattersons urge this court to declare the term "Tourist Home" void for vagueness. The Pattersons contend that the term "transient" used in the definition of tourist home is not defined in the zoning regulations. Therefore, there are no standards to determine what is, and is not, "transient." Thus, the term cannot be legally applied to prohibit the Pattersons' activities. The Pattersons rely upon the due process provisions of the Constitutions of the United States and Tennessee. "Due Process of law requires . . . notice of what the law prohibits. Laws must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." *City of Knoxville v. Entertainment Resources, LLC*, 166 S.W.3d 650, 655 (Tenn. 2004). The Pattersons attack [the Commissioner's] position that the Pattersons' furnishing lodging to transients for compensation violates the regulations. . . .[3]

* * *

Basically, the Hamilton County zoning regulations are based upon certain uses being permitted within certain zoning districts. If a

[3] At this point in the memorandum opinion, the trial court discussed the definition of "Tourist Court" contained in the zoning regulations, stating that "the court agrees that the Pattersons do not operate a tourist court or motel. Further discussion on this point is not necessary."

> use is not listed as a permitted use, then that use is not permitted within that zoning district. Article III, Section 105 of the Hamilton County zoning regulations provide no "[b]uilding or premises be used for any purpose other than is permitted in the district in which such building or premises is located. . . ." The rental of the dwelling for a nightly to weekly rental business is similar to a motel. It is a commercial use of a residential dwelling in a residential neighborhood. The R-1 zoning district does not list a tourist home . . . as a permitted use. The fact that a tourist home is not specifically excluded in the R-1 designation has no legal significance. . . .
>
> The term "tourist home" was defined in the ordinance. The definition applies to "A residential building where lodging is furnished to transients for compensation and containing not more than five sleeping rooms for such transients." The Pattersons' house in question is a residential building. The Pattersons offer lodging in return for compensation, *i.e.*, rent. The building does not contain more than five sleeping rooms. The Pattersons' house is advertised as containing three (3) bedrooms. . . .

(Bold print, capitalization and underlining in original; headings in memorandum opinion omitted; footnote added).

The trial court then rejected the Pattersons' argument that the zoning ordinance was unconstitutionally vague because it did not specifically define the word "transient." After reviewing applicable case law, the trial court concluded that "transient" referred to people who were temporarily staying at a place; the court concluded that the people who rented the Pattersons' home were, therefore, transients. The trial court then concluded that the zoning regulations, as applied to the Pattersons, were "constitutional and legal." The trial court added:

> The zoning regulations specify (20) different zoning districts. These districts have been established "in order to regulate, restrict, and segregate the use of land, buildings and structures." Article III, Section 100. Section 105 of the same article provides that "[n]or shall any building or premises be used for any purpose other than is permitted in the district in which such buildings or premises is located. . . ." The Pattersons cannot operate a tourist home in the R-1 zoning district because [neither] operation of a tourist home, nor anything of a similar nature, is permitted in the R-1 zoning district.

The trial court then denied the Pattersons' motion for summary judgment and granted the Commissioner's motion. The trial court instructed the parties to appear in court at a later date to present evidence as to the propriety of the imposition of a monetary penalty against the Pattersons. Following this final hearing, the trial court entered a final judgment. The court concluded that the Pattersons continued to rent their house after June 13, 2006, even though they were specifically informed not to do so by the Commissioner on that date. Accordingly, the trial court awarded a penalty against the Pattersons in the amount of $49.99 per day for each day of a knowing violation. This amounted to $22,395.52.

II.

The Pattersons appeal the trial court's final judgment. The Pattersons assert that the trial court erred when it determined that the zoning regulations prohibited their rental activities in the R-1 zone. The Pattersons also contend that the trial court erred when it concluded that the zoning regulations as applied to them were constitutional. The final issue raised by the Pattersons is their claim that the trial court erred in the calculation of damages awarded to the Commissioner.

III.

Our review is *de novo* upon the record of the proceedings below; however, that record comes to us with a presumption that the trial judge's factual findings are correct. Tenn. R. App. P. 13(d). We must honor this presumption unless we find that the evidence preponderates against those findings. ***Hass v. Knighton***, 676 S.W.2d 554, 555 (Tenn. 1984); Tenn. R. App. P. 13(d). Our review of the trial court's conclusions on matters of law, however, is *de novo* with no presumption of correctness. ***Taylor v. Fezell***, 158 S.W.3d 352, 357 (Tenn. 2005). We likewise review the trial court's application of the law to the facts *de novo*, with no presumption of correctness. ***State v. Thacker***, 164 S.W.3d 208, 248 (Tenn. 2005) (citation omitted).

IV.

In ***Lions Head Homeowners' Ass'n v. Metro Bd. of Zoning Appeals***, 968 S.W.2d 296 (Tenn. Ct. App. 1997)[4], this Court discussed the rules of construction applicable to zoning ordinances as follows:

> The courts construe zoning ordinances using the same principles used to construe statutes. *See City of Knoxville v. Brown*, 195 Tenn. 501, 507, 260 S.W.2d 264, 267 (1953); *Anderson County v. Remote Landfill Servs., Inc.*, 833 S.W.2d 903, 908-09 (Tenn. Ct. App. 1991). Thus, when the language of a zoning ordinance is

[4] The unanimous opinion of this Court in ***Lions Head*** was authored by Judge Koch, who is now an associate justice of the Tennessee Supreme Court.

> clear, the courts will enforce the ordinance as written. If, however, the language is ambiguous, the courts will bring to bear the customary interpretational canons in order to arrive at the ordinance's meaning. *See Whittemore v. Brentwood Planning Comm'n*, 835 S.W.2d 11, 15 (Tenn. Ct. App. 1992).
>
> Accordingly, the courts construe zoning ordinances as a whole, *see Tennessee Manufactured Hous. Ass'n v. Metropolitan Gov't*, 798 S.W.2d 254, 257 (Tenn. Ct. App. 1990), and give their words their natural and ordinary meaning unless the ordinance requires otherwise. *See Boles v. City of Chattanooga*, 892 S.W.2d 416, 420 (Tenn. Ct. App. 1994). A proper construction furthers the ordinance's general purposes, *see Jagendorf v. City of Memphis*, 520 S.W.2d 333, 335 (Tenn. 1974); *State ex rel. Smith v. City of Nashville*, 51 Tenn. App. 23, 29, 364 S.W.2d 106, 109 (1962), but at the same time prevents the ordinance from being applied to circumstances beyond its scope. *See Red Acres Imp. Club, Inc. v. Burkhalter*, 193 Tenn. 79, 84-85, 241 S.W.2d 921, 923 (1951).
>
> The courts must also construe zoning ordinances with some deference toward a property owner's right to the free use of his or her property. *See State ex rel. Morris v. City of Nashville*, 207 Tenn. 672, 680, 343 S.W.2d 847, 850 (1961); *Boles v. City of Chattanooga*, 892 S.W.2d at 420; *State ex rel. SCA Chem. Servs., Inc. v. Sanidas*, 681 S.W.2d 557, 562 (Tenn. Ct. App. 1984). Accordingly, the courts should resolve ambiguities in a zoning ordinance in favor of a property owner's unrestricted use of his or her property. *See State ex rel. Wright v. City of Oak Hill*, 204 Tenn. 353, 356, 321 S.W.2d 557, 559 (1959).

Id., at 301.

In an earlier opinion, also authored by Judge (now Justice) Koch, the following discussion about vagueness in zoning regulations is to be found:

> [W]hen the language of an ordinance is clear, the courts should enforce the ordinance as written even if hardship results. If, however, the ordinance lacks precision, the courts should call upon their arsenal of interpretational rules, presumptions, and aids to arrive at the ordinance's meaning and intent. *Murray v. Board of Appeals of Barnstable*, 22 Mass. App. Ct. 473, 494 N.E.2d 1364, 1368 (1986).

> Zoning ordinances should be free from vague terms and imprecise language because of the importance of the property interests involved. [3 R. Anderson, *American Law of Zoning* § 18.01 (3d ed. 1986) ("Anderson")]. However, they need not be unerringly accurate. *Maurer v. Austin Square, Inc.*, 6 Ohio App.2d 41, 215 N.E.2d 724, 726 (1966). If a zoning ordinance does not define a term, the term should be given its natural and ordinary meaning, and the ordinance should be construed to carry out its general purpose. *Jagendorf v. City of Memphis*, 520 S.W.2d 333, 335 (Tenn. 1974); Anderson § 18.13; *Yokley* § 25-6. However, any ambiguity in a zoning ordinance should be resolved in favor of an owner's unrestricted use of his or her property. *State ex rel. Morris v. City of Nashville*, 207 Tenn. 672, 680, 343 S.W.2d 847, 850 (1961); *State ex rel. Wright v. City of Oak Hill*, 204 Tenn. 353, 356, 321 S.W.2d 557, 559 (1959); Anderson §§ 18.04, 18.05.
>
> The meaning of a zoning ordinance and its application to a particular circumstance are, in the first instance, questions for the local officials to decide. *Sokol v. City of Lake Oswego*, 100 Or. App. 594, 786 P.2d 1324, 1325 (1990). Thus, the courts attach great significance to the local officials' prior interpretations of an ordinance, *see* Anderson § 18.09, but attach little weight to after-the-fact statements by local officials concerning their intentions or motivations for enacting an ordinance. *See Levy v. State Bd. of Examiners for Speech Pathology & Audiology*, 553 S.W.2d 909, 912 (Tenn. 1977); *Davidson County v. Rogers*, 184 Tenn. 327, 333-34, 198 S.W.2d 812, 815 (1947); Anderson § 18.07 n. 70.
>
> The courts, however, must ultimately take responsibility for construing statutes and ordinances. *Neff v. Cherokee Ins. Co.*, 704 S.W.2d 1, 3 (Tenn. 1986); Anderson § 18.09. While they may defer to fairly debatable interpretations of ambiguous statutes and ordinances, they will not hesitate to set an interpretation aside if it is arbitrary and capricious, if it is contrary to the drafters' intent, or if it undermines the statute's or ordinance's validity.

Whittemore v. Brentwood Planning Comm'n, 835 S.W.2d 11, 15-16 (Tenn. Ct. App. 1992).

We first will address the Pattersons' argument that the zoning regulations are unconstitutionally vague as applied to them, an issue we find dispositive of this appeal. As set forth in the trial court's opinion, the zoning regulations specifically define the terms "Tourist

Home" and "Tourist Court." We agree with the trial court that the Pattersons clearly were operating a "Tourist Home" and not a "Tourist Court." A "Tourist Court" is provided its own separate zoning classification. *See* Hamilton County Zoning Regulations section 1200, titled "1200. C-1 TOURIST COURT AND MOTEL DISTRICT REGULATIONS", found on pages 67-68 of the regulations.[5] Not counting the number of times "Tourist Court" is mentioned in the specific C-1 classification, the term "Tourist Court" is found a total of ten additional times throughout the remainder of the zoning regulations.[6] However, other than being contained in the "Definitions" section of the zoning regulations, the regulations never again, not even once, mention the term "Tourist Home." Absolutely no information is provided informing a property owner of the appropriate zoning classification for operating a Tourist Home.

The fact that the drafters of the regulations went to the trouble to specifically define "Tourist Home" would lead a reasonable person to conclude that the regulations will set forth where a resident can operate such a "Tourist Home." Otherwise, there would be no point in specifically defining that term. As stated, after defining "Tourist Home," the regulations never again mention that term. This would lead a reasonable person to conclude one of two things. First, the drafters of the regulations intended to include in the regulations at least one zone where tourist homes could be operated. Such a conclusion is even more apparent when considering the fact that the most similar term, *i.e.* "Tourist Court" was given its own zoning classification. Of course, if there was supposed to be a zone where tourist homes are allowed, but the regulations simply neglected to provide for such, then unquestionably the regulations are impermissibly vague because of this glaring omission. Property owners would be forced to simply try and "guess" where the drafters of the regulations meant to allow the operation of tourist homes. "The standard normally used in determining if a statute is vague, is whether 'men of common intelligence must necessarily guess at its meaning.' " ***Davis-Kidd Booksellers, Inc.***, ***v. McWherter***, 866 S.W.2d 520, 532 (Tenn. 1993)(citing ***Broadrick v. Oklahoma***, 413 U.S. 601, 607, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973)).

The other potential conclusion is that the drafters of the zoning regulations did not neglect to provide a zone where tourist homes could be located, even though they went to the unnecessary trouble of defining that term. As the trial court noted, according to the regulations, "[i]f a use is not listed as a permitted use, then that use is not permitted within the zoning district." This would mean that tourist homes *are completely prohibited* in Hamilton County. By process of elimination, because the regulations do not state where a tourist home can be located, then they cannot be located in any of the 20 zoning classifications. This would also render completely unnecessary the analysis described by Barry Bennett that a tourist home is "more similar" to a tourist court which is zoned as C-1. It would not matter if a tourist home is

[5] The regulations have since been amended. Section 1200 is now found on pages 69-70 of the version of the regulations current through November 2008.

[6] The term "Tourist Court" is also found on pages 2, 13, 15, 17, 70, 82, 89, 113, 117, and 146.

"more similar" to a tourist court because a tourist home is not listed as a permissible use in the C-1 district and, therefore, it is prohibited. In short, it would be an exercise in futility to try and determine what classification a "tourist home" is most similar to because if it is not specifically listed, then it is excluded. We hasten to add that a conclusion that tourist homes are completely excluded in Hamilton County would raise a significant issue as to whether there was a rational basis to prohibit tourist homes altogether in the county, as well as whether selective enforcement is taking place because numerous other residents who have "tourist homes" in Hamilton County are not being sued.

This Court only has two options. We can either conclude that tourist homes are completely prohibited in Hamilton County; or we can conclude that they are not. There is no middle ground. This Court is not inclined to hold that Hamilton County intended to completely prohibit tourist homes from existing anywhere in the county. The reasons for this are fairly obvious, not to mention the fact that the Commissioner does not argue on appeal that Hamilton County intended to completely exclude tourist homes.

Since we have excluded the first option, *i.e.*, that tourist homes are completely prohibited, we are left with the second option, *i.e.*, that Hamilton County did intend to allow tourist homes at least somewhere in the county. Since, as presumed by us, the county intended to allow tourist homes, the regulations must provide at least one zone where they are allowed because, based on the language of the regulations and as discussed at length above, a complete failure to mention tourist homes results in a total prohibition. Unfortunately, the regulations simply do not specify where a tourist home may be located. Thus, homeowners such as the Pattersons are left with no alternative but to try and "guess" what the drafters of the regulations intended to do.

In ***City of Jackson v. Shehata***, No. W2005-01522-COA-R3-CV, 2006 WL 2106005 (Tenn. Ct. App. W.S., filed July 31, 2006), *perm. app. denied Dec. 18, 2006*, this Court stated as follows:

> "Due process of law requires, among other things, notice of what the law prohibits." *City of Knoxville v. Entm't Res., LLC,* 166 S.W.3d 650, 655 (Tenn. 2005); *see also Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 531-32 (Tenn. 1993). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). As the United States Supreme Court has noted:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policeman, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (footnotes omitted). Thus, "[i]f an ordinance is so vague that persons of common intelligence must necessarily guess at its meaning, it will not pass constitutional scrutiny." *Hutsell v. Jefferson County Bd. of Zoning Appeals*, No. E2004-00968-COA-R3-CV, 2005 Tenn. App. LEXIS 243, at *7, 2005 WL 954646 (Tenn. Ct. App. Apr. 26, 2005).

Zoning ordinances, being in derogation of the common law, must be strictly construed in favor of a property owner's right to the free use of his property. *City of Oak Hill v. State ex rel. First Christian Church*, 492 S.W.2d 915, 916 (Tenn. 1973); *City of Knoxville v. Brown*, 195 Tenn. 501, 260 S.W.2d 264, 267 (Tenn. 1953); *Red Acres Imp. Club, Inc. v. Burkhalter*, 193 Tenn. 79, 241 S.W.2d 921, 923 (Tenn. 1951); *Tenn. Manufactured Hous. Ass'n v. Metro. Gov't of Nashville & Davidson County*, 798 S.W.2d 254, 260 (Tenn. Ct. App. 1990). In evaluating the zoning ordinances at issue in this case, we are mindful of the following:

> Local land use planning decisions are basically legislative in character and are best left to local legislative bodies. *Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 342-43 (Tenn. 1983); *Robertson County v. Browning-Ferris Indus. of Tennessee, Inc.*, 799 S.W.2d 662, 667 (Tenn. Ct. App. 1990). Thus, courts reviewing either zoning ordinances or the administrative decisions

> implementing zoning ordinances are inclined to give wide latitude to the responsible local officials. They will not substitute their judgment for that of the local officials and will invalidate an ordinance or administrative decision only when it is illegal, arbitrary, or capricious. *McCallen v. City of Memphis*, 786 S.W.2d 633, 641-42 (Tenn. 1990). . . .
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> *Whittemore v. Brentwood Planning Comm'n*, 835 S.W.2d 11, 15-16 (Tenn. Ct. App. 1992).

City of Jackson v. Shehata, 2006 WL 2106005, at *5-6.[7]

Again, assuming that Hamilton County did not intent to completely prohibit tourist homes, then the Pattersons were not provided "fair warning" and were simply left to "guess" whether their house could be used as a tourist home even though it was zoned R-1, and unfortunately, they guessed wrong according to the Commissioner. For the foregoing reasons, we conclude that the Hamilton County zoning regulations, *as applied to the Pattersons*, are unconstitutionally vague. Because of this holding, the remaining two issues raised by the Pattersons are pretermitted. It necessarily follows that the Trial Court erred when it: (1) concluded that the Pattersons were in violation of the zoning regulations; (2) issued an injunction against the Pattersons renting their house; and (3) entered a monetary penalty against the Pattersons.

V.

The judgment of the trial court is reversed and this case is dismissed. This case is remanded to the trial court solely for collection of the costs below. Costs on appeal as well as those at the trial level are taxed to the Appellee, Dan Wade, Building Commissioner for Hamilton County, Tennessee, for which execution may issue, if necessary.

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CHARLES D. SUSANO, JR., JUDGE

[7] The portion of the ***Whittemore*** opinion that we have omitted from the ***Shehata*** quotation was set forth previously in this opinion.